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No. 91-1234

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1991

DOLORES J. RICHARDS,
Petitioner,
v.
LIBERTY MUTUAL FIRE INSURANCE COMPANY,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE FOURTEENTH SUPREME JUDICIAL DISTRICT OF TEXAS

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April 6, 1992

QUESTIONS PRESENTED

1. Whether this Court has jurisdiction over a claim that was not presented to the Texas Court of Appeals, the court to which a writ of certiorari is sought, or to the Texas Supreme Court.

2. Whether a litigant, whose cause of action is barred by application of a state Supreme Court ruling that changed the date on which the applicable statute of limitations commenced to run, has been deprived of Due Process of law within the meaning of the Fourteenth Amendment.

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE FOURTEENTH SUPREME JUDICIAL DISTRICT OF TEXAS

Respondent, Liberty Mutual Fire Insurance Company ("Liberty Mutual"),[1] respectfully urges the Court to deny a writ of certiorari to review the judgment of the Texas Court of Appeals in this proceeding.

[1] The caption contains the names of all parties to the proceedings below. Affiliates of Respondent Liberty Mutual Fire Insurance Company whose identities are required to be disclosed by Supreme Court Rule 29.1 are: Liberty Northwest Insurance Corporation; Helmsman Management Service Northwest, Inc.; Liberty Mutual Property-Casualty Holding Corporation; Liberty Insurance Corporation; Liberty Life Assurance Company of Boston; Helmsman Management Service, Inc.; Liberty International Insurance Agency, Inc.; Liberty Mutual Insurance Company (U.K.) Ltd.; and Helmsman (Underwriting) Ltd.

JURISDICTION

Richards invokes the Court's certiorari jurisdiction pursuant to 28 U.S.C. §1257(a). However, since Richards failed to raise properly her Due Process challenge in the courts below, the Court should deny certiorari for want of a properly presented federal question.

STATEMENT OF THE CASE

This is a worker's compensation insurance case. Petitioner Dolores J. Richards challenges a change in the rule governing commencement of limitations for the Texas cause of action she asserted. No constitutional or other federal rights are implicated.

After Richards incurred on-the-job injuries, Liberty Mutual provided her with worker's compensation benefits, but terminated those benefits on January 12, 1983. *See Liberty Mutual Fire Insurance Co. v. Richards*, 810 S.W.2d 232, 233 (Tex. App. 1991); *reproduced in* Appendix to Richard's Petition for Writ of Certiorari (hereafter "Richards Appendix") at 1a-4a. Richards' worker's compensation claim resulted in a judgment in her favor, which became final on April 30, 1986. *Liberty Mutual v. Richards*, 810 S.W.2d at 233; Richards Appendix at 2a.

On March 7, 1986, prior to the conclusion of her worker's compensation case, but more than three years after Liberty Mutual terminated her disability payments, Richards filed the suit now brought for review to this Court, seeking damages against Liberty Mutual for breach of a duty of good faith and fair dealing ("bad faith") in the processing of her claim. *Liberty Mutual v. Richards*, 810 S.W.2d at 233; Richards Appendix at 2a; Appendix to this brief (hereafter "Appendix") at A1-A2. At that time, however, there was no recognized cause of action for "bad faith" in Texas.

Moreover, in *Robinson v. Weaver*, 550 S.W.2d 18, 19 (Tex. 1977), the Texas Supreme Court had established long before Richards filed her claim that the two year limitations period for personal injury and other causes of action sounding in tort begins to run when the cause of action accrues, that is, when facts come into existence that authorize a claimant to seek a judicial remedy. *Id.*

In January, 1987, while this action was pending in state district court, the Texas Supreme Court recognized the tort of "bad faith" denial or termination of insurance benefits in the context of first party insurance. *Arnold v. National County Mut. Fire Ins. Co.*, 725 S.W.2d 165, 168 (Tex. 1987). In *Arnold*, the court departed from the established rule of *Robinson*, holding that the two year limitations period governing bad faith claims would not begin to run until the underlying contract claims were finally resolved. *Id.* at 168. More than a year later, the Texas Supreme Court ruled that the tort of "bad faith" applied to the processing of worker's compensation claims, *Aranda v. Ins. Co. of N. America*, 748 S.W.2d 210, 212 (Tex. 1988), thus recognizing a theory similar to that Richards had been pursuing against Liberty Mutual.[2]

The action went to trial and, on July 19, 1988, judgment was entered on a jury verdict in favor of Richards for $3.58 million. *Liberty Mutual v. Richards*, 810 S.W.2d at 233. Liberty Mutual appealed, but on April 18, 1990, after both parties had filed opening briefs, the Texas Supreme Court corrected the anomalous limitations holding of *Arnold*. *Murray v. San Jacinto Agency, Inc.*, 800 S.W.2d 826 (Tex. 1990). The Court restored the applicability of the

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[2] It was thus the retroactive application of *Aranda* and *Arnold* that breathed life into Richards' claim five years after the conduct complained of took place, permitting the action to proceed to trial.

Robinson rule to bad faith law, holding that limitations begins to run on bad faith claims, as on most claims, when the cause of action accrues, that is, "when the wrongful act effects an injury". *Id.* at 829.

Richards' Supplemental Brief, filed in the Court of Appeals on May 21, 1990, the day before oral argument, was her first opportunity to brief for the court the Due Process implications of applying *Murray* retroactively.[3] Richards nonetheless failed to raise any federal constitutional issue in that brief. Appendix at A1-A7.

On April 4, 1991, the Court of Appeals issued its opinion reversing the judgment in favor of Richards on the ground that, under *Murray*, limitations barred Richards' cause of action since it was filed more than two years after Liberty Mutual's final termination of disability payments. *Liberty Mutual v. Richards*, 810 S.W.2d at 234. After denial of two Motions for Rehearing in the Court of Appeals, neither of which discussed or cited authority for a federal Due Process challenge, *see* Richards Appendix at 5a-6a, Richards applied for a Writ of Error to the Texas Supreme Court. In that Application, Richards failed to raise a Fourteenth Amendment challenge to the Court of Appeals' holding. Appendix at A8-A12. The Texas Supreme Court denied the Application with the notation "Writ Denied" on September 18, 1991. Richards Appendix at 9a. After the Texas Supreme Court denied Richards' Motion for Rehearing

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[3] Richards' claim that the Motion for Rehearing in the Court of Appeals presented her first opportunity to raise the federal Due Process issue is incorrect because the decision in *Murray*, announced even before the Court of Appeals heard oral argument in the instant case, clearly presented the possibility that Richards' cause of action would be barred if the Court of Appeals applied the new rule retroactively. Thus, Richards had the opportunity to raise her Due Process concerns well before the Court of Appeals ruled and Richards pursued rehearing.

on November 6, 1991, Richards Appendix at 10a, Richards filed her Petition for Writ of Certiorari on January 31, 1992.

REASONS FOR DENYING THE WRIT

Summary of Argument

The Petition should be denied first because it fails to present a federal question. Under Texas law, Richards failed to preserve in the Texas appellate courts the federal constitutional issue now raised in her Petition. For this Court to assume jurisdiction, it must plainly appear that a federal question is necessarily presented. Richards' failure to present the issue below thus constitutes a sufficient, independent non-federal ground on which the judgment below rests, depriving this Court of jurisdiction.

The issue Richards raises is settled under early, unquestioned decisions of this Court that recently have been reaffirmed. Since statutes of limitations constitute remedial rather than fundamental rights, a state may apply decisions effecting changes in limitations to pending cases without offending Due Process. The lower court opinions Richards reads as creating a split of authority on the issue of "vesting" are, in fact, either consistent with this rule or factually so distinguishable as to be inapposite. Moreover, granting certiorari would have no beneficial effect on the administration of justice in the state or federal courts. Granting certiorari and reversing this case would, rather, create disruption and confusion with respect to a rule of law that has been settled since the late nineteenth century.

Contrary to Richards' contention, review of this case would give this Court no opportunity to address any tension among federal cases refusing, on policy rather than constitutional grounds, to retroactively apply intervening changes in law. Finally, the lack of any real unfairness to

Richards in terms of the degree of foreseeability of the change in the limitations trigger date further supports denial of her Petition.

Argument

I

Certiorari should be denied for lack of jurisdiction because Richards did not present her federal Due Process claim to the Texas Court of Appeals, the court to which a writ of certiorari is sought, or to the Texas Supreme Court.

Richards seeks a writ of certiorari to the Texas Court of Appeals on the ground that its ruling violated her right to Due Process of law. Richards never properly asserted this argument before the Texas Court of Appeals or in her application for writ of error to the Texas Supreme Court.

This Court has long adhered to the rule that, when reviewing state court decisions, it will not consider federal constitutional questions unless they were raised and "actually decided" in the state courts. *Cardinale v. Louisiana*, 394 U.S. 437, 438 (1969); *Beck v. Washington*, 369 U.S. 541, 553 (1962); *Ferguson v. Georgia*, 365 U.S. 570, 572 (1961). "If both these do not appear on the record, the appellate jurisdiction fails." *Cardinale*, at 438. For this Court to assume jurisdiction, it must plainly appear that a federal question is necessarily presented, that is, that the judgment below could not rest on an independent non-federal ground sufficient to support it. *Department of Mental Hygiene v. Kirchner*, 380 U.S. 194, 197 (1965); *Ferguson*, 365 U.S. at 572 n. 1. A sufficient independent non-federal ground is established if the state appellate courts from which the case

derives would consider the federal issue waived. *Beck*, 369 U.S. at 553. Since Richards' Due Process challenge was neither properly preserved nor "actually decided" at the state court level, the sole federal question Richards presents is not properly before this Court.

While Richards did insert a topic heading mentioning her federal rights in her Motion for Rehearing before the Court of Appeals, Richards Appendix at 6a, this heading is not sufficient under Texas law to present error to the Court of Appeals. An uninterrupted line of Texas cases establishes that error is waived before the Court of Appeals if not supported with either argument or authorities. *Martin v. Cohen*, 804 S.W.2d 201 (Tex. App. 1991, no writ); *Houston Lighting & Power v. Klein Independent School Dist.*, 739 S.W.2d 508, 514 (Tex. App. 1987, writ denied); *Brown v. Capital Bank, N.A.*, 703 S.W.2d 231, 234 (Tex. App. 1985, writ ref'd n.r.e.); TEX. R. APP. P. 74(f), 100(a), 131(f)(Vernon Supp. 1992). This Court has found that a similar failure to preserve an issue on appeal pursuant to state law undermines this Court's jurisdiction to review the issue on certiorari. *Beck*, 369 U.S. at 553-54. The Texas Court of Appeals' silence on the issue of Due Process in this case can be attributed only to Richards' failure to raise the point properly.

In addition, Richards failed to present her federal constitutional claim to the Texas Supreme Court. In order to be considered by the Texas Supreme Court, an issue must be assigned as error in the Application for Writ of Error. *Nobility Homes of Texas, Inc. v. Shivers*, 557 S.W.2d 77, 83 (Tex. 1977); *City of Deer Park v. State*, 275 S.W.2d 77, 84 (Tex. 1955); *U.S. v. Ray Thomas Gravel Co.*, 380 S.W.2d

576, 579 (Tex. 1964).[4] Richards did not assign as error to the Texas Supreme Court any violation of her Due Process rights. Appendix at A8-A12.

Moreover, had Richards raised such a challenge in her Application for Writ of Error, that contention was nonetheless not preserved before the Texas Supreme Court because she failed properly to raise it in her Motion for Rehearing before the Court of Appeals. The Texas Supreme Court has held repeatedly that it "cannot consider points of error that were not assigned on rehearing in the court of appeals." *Albright v. City of Houston*, 677 S.W.2d 487, 488 (Tex. 1984); *see also Smith v. Baldwin*, 611 S.W.2d 611, 618 (Tex. 1980); TEX. R. APP. P. 131(e) (Vernon Supp. 1992). Richards failed to raise her Due Process argument in her Motion for Rehearing in the Court of Appeals and in her Application for Writ of Error to the Texas Supreme Court. This failure constitutes an independent state law ground for denying the writ. *Dept. of Mental Hygiene v. Kirchner*, 380 U.S. 194 (1965).

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[4] While fundamental error may be considered even if not assigned in the Application, *McCauley v. Consolidated Underwriters*, 304 S.W.2d 265, 266 (Tex.1957)(jurisdictional defect is fundamental error), application of a limitations period, even if erroneous, cannot be considered error that is apparent on the face of the record and that "directly and adversely affects the interest of the public generally", as the Texas Supreme Court defines fundamental error. *City of Deer Park v. State*, 275 S.W.2d at 85; *Ramsey v. Dunlop*, 205 S.W.2d 979, 983 (Tex. 1947)(disputed election to public office as fundamental error).

II

While a cause of action is considered a "species" of property within the meaning of the Fourteenth Amendment, retroactive application of a change in the date from which the applicable statute of limitations runs is within the discretion of the state and does not implicate Due Process concerns.

The issue presented by this case is neither new nor controversial. Absent from Richards' Petition is any mention of the consistent line of precedent from this Court holding that, generally, retroactive operation of state court rulings, whether concerning statutes of limitations or other procedural requirements, is not repugnant to any provision of the U.S. Constitution. *See, e.g., Tidal Oil Co. v. Flanagan*, 263 U.S. 444, 450 (1924) (reversal of prior decision by state court to prejudice of one party does not deprive that party of Due Process because parties were fully heard in state court); *Fleming v. Fleming*, 264 U.S. 29 (1924) (no impairment of right to contract); *Central Land Co. v. Laidley*, 159 U.S. 103, 112 (1895) (no Due Process violation); *see also* Annot., "Prospective or retroactive operation of overruling decision," 10 A.L.R.3d 1371, 1391-93, n. 19 (1966); Annot., "Retroactive or merely prospective operation of new rule adopted by court in overruling precedent - federal cases," 14 L.Ed.2d 992, 1002-1003 (1965). As Justice Cardozo wrote in *Great Northern R. Co. v. Sunburst Oil & Refining Co.*, 287 U.S. 358 (1932), with respect to the issue of retrospective versus prospective operation of changes in the law:

> We think the Federal constitution has no voice upon the subject. A state in defining the

> limits of adherence to precedent may make a choice for itself between the principle of forward operation and that of relation backward. [W]e are not at liberty, for anything contained in the constitution. . . to thrust upon those courts a different conception either of the binding force of precedent or of the meaning of the judicial process.

Id. at 364-365. In short, "[s]ound or unsound, there is involved in [this choice] no denial of a right protected by the Federal Constitution". *Id.* at 364; *see also Linkletter v. Walker*, 381 U.S. 618 (1965) (retroactive operation of decision overruling another is a matter of judicial policy not constitutional compulsion).

Moreover, in a case not cited in Richards' Petition, this Court rejected a contention similar to that she advances. In *Chase Securities Corp. v. Donaldson*, 325 U.S. 304 (1945), the Court addressed a challenge to the Minnesota Supreme Court's retroactive application of a change in the date of commencement of a statute of limitations, effectively removing the limitations defense in that action and rendering the action timely. In rejecting the claim that this retroactive application violated the defendant's Due Process rights, the Court recognized that the issue had been settled since *Campbell v. Holt*, 115 U.S. 620 (1885), in which the Court held that "where lapse of time has not invested a party with title to real or personal property, a state legislature, consistently with the Fourteenth Amendment, may repeal or extend a statute of limitations." *Chase Securities Corp.*, 325 U.S. at 311.

The Court based its holding on the nature of statutes of limitation, which it described in the following, widely-quoted language:

> Statutes of limitation. . . are practical and pragmatic devices to spare the courts from litigation of stale claims, and the citizen from being put to his defense after memories have faded, witnesses have died or disappeared, and evidence has been lost. (citation omitted). They are by definition arbitrary, and their operation does not discriminate between the just and the unjust claim, or the avoidable and unavoidable delay. . . .Their shelter has never been regarded as. . . a 'fundamental' right. . . the history of pleas of limitation shows them to be good only by legislative grace and to be subject to a relatively large degree of legislative control.

Id. at 314 (emphasis added). The Court then pointed out that *Campbell v. Holt* adopted the view that "as a matter of constitutional law, statutes of limitations go to matters of remedy, not to destruction of fundamental rights," a distinction that emphasizes "the real and valid difference between rules in which stability is of prime importance and those in which flexibility is a more important value." *Id.* The Court therefore held that "the existence of the policy at the time the action was commenced did not . . . give the [defendant] a constitutional right against change of policy before final adjudication". *Id.* at 316.

Chase Securities was explicitly approved in *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982), the case on which Richards founds her argument. After holding that an injured employee who had never had an opportunity to be heard on her employment discrimination claim was deprived of Due Process, the *Logan* Court went on to write that

> [o]bviously, nothing we have said entitles

> every civil litigant to a hearing on the merits in every case. The State may erect reasonable procedural requirements for triggering the right to an adjudication, be they statutes of limitations, cf. *Chase Securities Corp. v. Donaldson*, 325 U.S. at 314-316 . . . or, in an appropriate case, filing fees. *United States v. Kras*, 409 U.S. 434 (1973). And the State certainly accords due process when it terminates a claim for failure to comply with a reasonable procedural or evidentiary rule. *Hammond Packing Co. v. Arkansas*, 212 U.S. at 351; *Windsor v. McVeigh*, 93 U.S. at 278.

Logan, 455 U.S. at 437.[5] Under *Logan* and *Chase Securities*, a cause of action is, of course, a species of property entitled to Due Process protection. Nonetheless, until that cause of action has reached "final adjudication", *Chase Securities*, 325 U.S. at 316, it is subject to intervening changes in procedural rules that may, consistent with Due Process, terminate the "right to adjudication" of the claim. *Logan*, 455 U.S. at 437.

Campbell v. Holt and *Chase Securities* both relied on the distinction between a cause of action that "has not invested a party with title to real or personal property" and one that has reached "final adjudication". *Id.* at 311, 316. Richards, however, contends that unadjudicated causes of action like her own should be treated like final judgments (and, apparently, other forms of property as well) for Due Process purposes. As *Chase Securities* recognizes, however,

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[5] This Court also reaffirmed the holding of *Chase Securities* in *International Union of Electrical, Radio & Machine Workers v. Robbins & Myers*, 429 U.S. 229, 244 (1976).

this proposal is unworkable because of the need for flexibility in matters of judicial procedure, which, as a purely practical matter, can affect only those causes of action that have not been finally adjudicated; final judgments, like other forms of property, are unaffected by changes in procedural rules such as statutes of limitations.

Richards' attempt to find a conflict among the lower court rulings on the issue of "vesting" is based on the same misconception. The cases Richards reads as holding that the property interest in a cause of action does not vest, for Fourteenth Amendment purposes, until final, unreviewable victory (the "final victory" cases)[6], are entirely consistent with the approach taken in *Campbell* and *Chase Securities* and approved in *Logan*. The "final victory" cases treat non-final claims in the same way *Chase Securities* did, holding that changes in state limitations rules may be applied to pending cases without offending the Fourteenth Amendment. The "vesting" language in these cases that is emphasized by Richards merely follows the distinction employed in *Chase Securities* between the intangible property interest in a cause of action and the more tangible interests in, for example, real property or a judgment for damages.[7] These latter interests are different simply because they are beyond the reach of procedural contingencies such as statutes of limitations or

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[6] These cases are *Arbour v. Jenkins*, 903 F.2d 416 (6th Cir. 1990); *Sowell v. American Cyanamid Co.*, 888 F.2d 802, 805 (11th Cir.1989); *Konizeski v. Livermore Labs*, 820 F.2d 982 (9th Cir. 1987), *cert. denied*, 485 U.S. 905 (1988); *Hammond v. United States*, 786 F.2d 8, 12 (1st Cir.1986); and *Clausell v. Hobart Corp.*, 515 So.2d 1275 (Fla.1987) *cert. denied*, 485 U.S. 1000 (1988).

[7] Richards concedes in her Petition that a final, unreviewable judgment for damages is a more tangible property interest than a simple cause of action. Petition at 8-9.

filing fees, to which non-final claims are subject. *See, e.g., Konizeski*, 820 F.2d at 989. The putative "final victory" cases merely follow *Campbell v. Holt* and *Chase Securities* in recognizing this distinction and adjusting Due Process scrutiny in light of the need for flexibility in matters of remedy, as opposed to fundamental rights. *Id.* Since, as a matter of policy, procedural rules must remain flexible, they are, in the language of *Chase Securities*, 325 U.S. at 314, matters of legislative or judicial grace rather than constitutional right. Consequently, a state's power to terminate the right to adjudicate a cause of action by changing a procedural rule is unlimited by the Fourteenth Amendment. These cases, therefore, neither contradict the view of property in *Logan* nor overextend that taken in *New York Central R.R. Co. v. White*, 243 U.S. 188 (1917) and *Duke Power Co. v. Environmental Study Group, Inc.*, 438 U.S. 59 (1978).

It is also incorrect to suggest that the "final victory" cases conflict with the approach taken in such cases as *Grimes v. Pearl River Valley Water Supply Dist.*, 930 F.2d 441 (5th Cir. 1991); *Williams v. Hofley Mfg. Co.*, 424 N.W.2d 278 (Mich. 1988), *appeal dism'd*, 489 U.S. 1001 (1989); *Crier v. Whitecloud*, 496 So.2d 305 (La. 1986); and *Black v. Ball Janitorial Service, Inc.*, 730 P.2d 511 (Okla. 1986), since these latter cases do not involve issues of retroactive application of intervening changes in the law. These cases thus implicate very different Due Process concerns from those that involve issues of retroactive application of law. These cases are distinguishable from, not inconsistent with, the "final victory" cases.[8]

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[8] The lower court cases considering this issue are reconcilable on the additional ground that each litigant affected by an intervening change in law actually received all the process due under the Fourteenth

Richards has not cited a single case from any court, federal or state, that upheld a challenge to retroactive application of a statute of limitations or other procedural requirements, on Due Process grounds, in conflict with *Logan*. This is simply because the issue is well settled and, at least since *Campbell v. Holt* (1885), has ceased to be a matter of any controversy among state or federal courts.

Besides being well-settled, the issue presented is of no national importance. As the cases discussed above reflect, the issue is one of state discretion, not Due Process. In addition, the choice between retroactive and prospective application of a change in the law will affect only a small portion of cases affected by the change itself, that is, those cases that happen to be in the judicial process when the change takes effect. Review of the instant case thus would not advance the orderly and efficient administration of justice, in either the state or federal systems. Moreover, far from conserving judicial resources and saving time and money for litigants, granting certiorari and reversing this case would require overruling at least *Campbell v. Holt* and *Chase Securities* and disapproving several lower court rulings, creating disruption and confusion.

Amendment, having been heard before the respective court or legislature on the issue of retroactive application. *See, e.g., Central Land Co. v. Laidley*, 159 U.S. at 112; *Konizeski*, 820 F.2d at 990; *Grimes*, 930 F.2d at 444. Due Process guarantees only an opportunity to be heard, not ultimate success. *Konizeski*, 820 F.2d at 990. Reliance on this principled reconciliation of the cases is far preferable to the disruption that would be occasioned by a ruling in this case on "vesting" for Due Process purposes.

III

Any tension between *Chevron* and *Lampf* or between *Logan* and *Lampf* cannot be resolved by considering the instant case because *Lampf* and *Chevron* were decided on federal policy grounds, not the constitutional ground on which Richards relies.

Richards finds "tension" between *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971) and *Lampf, Pleva, Lipkind, Pupis & Petigrow v. Gilbertson*, ____U.S.____, 111 S. Ct. 2773 (1991), and requests that this Court review the instant case so as to resolve this tension. Even if there is in fact some conflict between these decisions, the case before this Court is not an effective vehicle to settle the controversy because that issue is not properly before this Court.

As Richards concedes, *Chevron*; *James B. Beam Distilling Co. v. Georgia*, 501 U.S. ____, 111 S.Ct. 2439 (1991); *American Trucking Assn. v. Smith*, 496 U.S. 167 (1990); *St. Francis College v. Al-Khazraji*, 481 U.S. 604 (1987); *Gulf Offshore Co. v. Mobile Oil Corp.*, 453 U.S. 473 (1981); *Thorpe v. Housing Auth. of City of Durham*, 393 U.S. 268 (1969); and *Bradley v. Richmond School Board*, 416 U.S. 696 (1974) considered the issue of retroactive application of federal judicial decisions or statutes only as a matter of federal policy.

Lampf, on the other hand, merely resolved a federal limitations question and, without discussing the *Chevron* standards, applied the new rule retroactively. Thus, resolution of the only issue Richards seeks to raise here, *i.e.*, the constitutional limits on a state's power to apply limitations decisions retroactively, would have no effect on the issues of federal policy decided in *Chevron*. Granting

certiorari in this case would not, logically, give this Court an opportunity to address itself either to the viability of the *Chevron* standards or to the silence of *Lampf* with respect to those standards, or to resolve any tension that might exist between the two. In deciding the instant case, any pronouncements the Court might make with respect to *Chevron* or *Lampf* would be pure dicta. Thus, Richards' contention that this Court could resolve open issues of federal policy by considering the issue of Due Process limits on retroactive State decisions is incorrect.

Further, Richards experienced not unfairness, but at most the retraction of a windfall. As she concedes, Richards filed this "bad faith" suit when no such cause of action existed in Texas. Thus, she had no reasonable expectation that her theory would be given credence in the first place. A rational evaluation of her chances, in fact, would have recognized that, based on the law as it stood at filing,[9] her suit was barred when filed more than two years after it accrued.[10] From any perspective, Richards' suit was a

---

[9] As the Court of Appeals recognized, the general rule at the time Richards filed her suit was that a cause of action accrues for limitations purposes at the time facts come into existence that authorize a claimant to seek a judicial remedy. *Liberty Mutual v. Richards*, 810 S.W.2d at 233 (*citing Robinson v. Weaver*, 550 S.W.2d 18, 19 (Tex. 1977)). Since the essence of Richards' claim was that her benefits had been denied in bad faith, it could only be concluded that limitations would be triggered on the date of such denial. Moreover, there is no unfairness where Richards had no reasonable expectancy in the viability of her suit until *Arnold* and *Aranda* changed Texas law.

[10] Richards' argument that the two year statute appeared inapplicable at the time she filed suit, Petition at 3 n.1, 16 n.6, is incorrect. Richards' pleadings expressly sought recovery for the personal injury concept of mental anguish. Appendix A1-A2. Thus, the two year statute, TEX. CIV. PRAC. & REM. CODE ANN. §16.003, Richards

gamble when it was filed in March 1986.[11]

Indeed, when *Aranda* recognized the "bad faith" theory in workers' compensation cases (and consequently required application of the *Arnold* trigger date), it appeared that Richards would receive a windfall, since her suit had been filed before the erroneous *Arnold* trigger date -- final adjudication of the underlying contract claim. When, however, *Murray* corrected *Arnold's* erroneous holding two years later, the Texas Supreme Court merely restored the law to the status quo in effect at the time Richards filed suit. Thus, what Richards claims to be "manifest injustice" is that

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Appendix at 11a, clearly applied at the time suit was filed. Obviously, this cause of action could not have been more specifically enumerated because it did not exist. Moreover, in *Arnold*, the Texas Supreme Court affirmed the applicability of the two year statute, while changing the date on which this period commences to run. 725 S.W.2d at 168. Thus, Richards was on notice from the beginning that her claim was governed by a two year limitation period. Significantly, Richards does not contend that *Arnold's* application of the two year statute was a change in the law that in any way prejudiced her rights, though she claims that at the time she filed suit the governing statute "reasonably appeared to be" the four year provision. Petition at 16 n. 6. Essentially, she concedes that she had no reasonable expectation that the four year statute applied.

[11] Richards fares no better in terms of notice even if she relies on California law, the leading body of law in the area of bad faith. At the time Richards filed suit, California adhered to a rule, identical to *Murray*, that a cause of action for bad faith accrues, and limitations commences, on the date the insured's claim is denied by the insurer. *Frazier v. Metropolitan Life Ins. Co.*, 169 Cal. App. 3d 90, 103, 214 Cal. Rptr. 883, 890 (1985); *McDowell v. Union Mutl. Life Ins. Co.*, 404 F. Supp. 136, 147 (C.D. Cal. 1975). Further, "bad faith" sounds in tort under Texas law. Under California law, a tort action for bad faith was governed by a two year, not a four year, statute of limitations. *Richardson v. Allstate Ins. Co.*, 117 Cal. App. 3d 8, 13, 172 Cal. Rptr. 423, 426 (1981).

during pendency of her claim, she was briefly the beneficiary of the fortuitous (and erroneous) change in the law which breathed life into her moribund claim (barred when filed) but was later corrected when *Murray* restored the status quo ante.[12]

The convoluted procedural history of this case makes it an inappropriate vehicle for deciding any issue of Due Process. Its unique posture would seriously limit its precedential effect. Consistent application of any principle announced would be fraught with difficulty. An area of Due Process law, exceptional for its clarity and certainty, would be subjected to the kind of confusion that has plagued the larger body of Due Process law.

Thus, the lack of any real injustice to the individual Petitioner, together with the unique procedural posture of this case, render it an inappropriate vehicle to decide any issue presented. In addition, no new or controversial issue of importance to the efficient administration of justice or other interests of national importance are presented. These circumstances dictate a denial of the Petition.

---

[12] Murray herself was in the same position as Richards, having filed suit under *Robinson* and received the temporary benefit of *Arnold*. The Texas Supreme Court nonetheless applied the new trigger rule retroactively to the very case in which it was announced. *Murray*, 800 S.W.2d at 830. Thus, the Court of Appeals in the instant case had little choice but to apply the new rule retroactively. This Court, in fact, considers it erroneous not to apply a new rule of federal law retroactively when that rule was so applied in the case announcing the rule. *James B. Beam*, 111 S. Ct. at 2444, 2446.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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April 6, 1992

APPENDIX

A1

No. 86-14004

DOLORES J. RICHARDS	IN THE DISTRICT COURT OF
VS.	HARRIS COUNTY, TEXAS
LIBERTY MUTUAL FIRE INSURANCE COMPANY	127TH JUDICIAL DISTRICT

PLAINTIFF'S ORIGINAL PETITION

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW DOLORES J. RICHARDS, hereinafter called Plaintiff, complaining of LIBERTY MUTUAL FIRE INSURANCE COMPANY, hereinafter called defendant, and for cause of action respectfully show unto the Court and Jury as follows:

I.

Plaintiff is a resident of Harris County, Texas. The Defendant is a duly incorporated insurance company doing business [sic] the State of Texas where service of process may be obtained by serving the Commissioner of Insurance, 1110 San Jacinto, Austin, Texas 78701-1998.

II.

NATURE OF CASE

On or about December 23, 1981, Plaintiff was working as an employee of Federated Department Stores, Inc. in Harris County, Texas. Prior to that date, Defendant LIBERTY MUTUAL FIRE INSURANCE COMPANY had sold a policy of workers' compensation insurance to Plaintiff's employer. As a result of the relationship between Plaintiff and Defendant, the Defendant owed Plaintiff a duty of good faith and fair dealing. After Plaintiff suffered an on-the-job injury on or about December 23, 1981, Defendant received notice that Plaintiff had suffered such an injury. From that time up until the present, the Defendant has continuously refused to pay the Plaintiff any weekly benefits under the policy of workers' compensation insurance. Although the Defendant agreed to pay some of Plaintiff's medical bills prior to trial, the Defendant has continuously refused to pay all medical bills incurred since that time. As a result of the conduct of the Defendant Plaintiff has suffered damages, including, but not limited to, physical pain, mental anguish, physical impairment, and loss of credit rating.

III.

Plaintiff alleges that the conduct of Defendant as set forth above constitutes a breach of the duty of good faith and fair dealing that arises from the relationship of the parties. Such breach was done willfully and intentionally or, in the alternative, with such an entire want of care that would raise the belief that such conduct was the result of conscious indifference to the rights or welfare of Plaintiff. Plaintiff has sustained actual damages as a result of the Defendant's conduct.

IV.

ACTUAL DAMAGES

Plaintiff has suffered the folLowing actual damages as a result of the Defendant's conduct, to-wit:

a. Severe mental anguish and emotional distress,

b. Physical pain in the past, and in all reasonable probability in the future,

c. Physical impairment in the past, and in all reasonable probability in the future,

d. Loss of enjoyment of life in the past, and in reasonable probability in the future, and

e. Loss of credit rating in the past, and in reasonable probability in the future.

V.

EXEMPLARY DAMAGES

Plaintiff further seeks exemplary damages from Defendant.

WHEREFORE, PREMISES CONSIDERED, Plaintiff prays upon final trial herein, she have and recover against the Defendant in actual damages and exemplary damages in an amount in excess of the minimal jurisdictional limits of this court, together with interest on such amounts as allowed by law, for costs of court, and for such other and further relief to which Plaintiff may show herself to be justly entitled.

Respectfully submitted,
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A3

[Excerpts from Richards' Supplemental Brief]

No. 14-88-00966-CV

IN THE FOURTEENTH COURT OF APPEALS
AT HOUSTON

LIBERTY MUTUAL FIRE INSURANCE COMPANY,
Appellant,

vs.

DOLORES J. RICHARDS,
Appellee

Appealed from the 127th Judicial District Court
of Harris County, Texas

SUPPLEMENTAL BRIEF FOR APPELLEE

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ORAL ARGUMENT REQUESTED

* * * *

REPLY POINTS

REPLY POINT ONE

THERE WAS SUFFICIENT EVIDENCE TO SUPPORT THE SUBMISSION OF, AND JURY RESPONSE TO, QUESTION NO. 1 CONCERNING LIBERTY MUTUAL'S BREACH OF THE DUTY OF GOOD FAITH AND FAIR DEALING. (In response to Appellant's Points of Error 1-10).

REPLY POINT TWO

THE TRIAL COURT PROPERLY SUBMITTED QUESTION NO. 1 CONCERNING LIBERTY MUTUAL'S BREACH OF THE DUTY OF GOOD FAITH AND FAIR DEALING. (In response to Appellant's Points of Error 11 and 12).

REPLY POINT TEN

THERE WAS SUFFICIENT EVIDENCE TO SUPPORT THE SUBMISSION OF, AND JURY RESPONSE TO, QUESTION NO. 5 CONCERNING THE AMOUNT OF EXEMPLARY DAMAGES. (In response to Appellant's Points of Error 39-42).

REPLY POINT THIRTEEN

MRS. RICHARDS' CLAIM OF BREACH OF THE DUTY OF GOOD FAITH AND FAIR DEALING WAS NOT BARRED BY THE TWO-YEAR STATUTE OF LIMITATIONS. (In response to Appellant's Point of Error 57).

BRIEF OF ARGUMENT

* * * *

REPLY POINT THIRTEEN

MRS. RICHARDS' CLAIM OF BREACH OF THE DUTY OF GOOD FAITH AND FAIR DEALING WAS NOT BARRED BY THE TWO-YEAR STATUTE OF LIMITATIONS. (In response to Appellant's Point of Error 57).

A. The Two-Year Statute of Limitations Does Not Govern

> The Murray Case Because a Cause Of Action For A Breach Of The Duty of Good Faith And Fair Dealing Is Not One Of The Actions Listed In Section 16.003(a) Of The Texas Practice & Remedies Code.

* * * *

B. The Four-Year Statute of Limitations Governs A Cause of Action For A Breach Of The Duty Of Good Faith And Fair Dealing.

* * * *

C. Any Change In The Statute Of Limitations Should Be Applied Prospectively.

Mrs. Richards filed her lawsuit in March, 1986. In *Arnold* and *Aranda* the Texas Supreme Court declared that the Statute of Limitations in "bad faith" cases did not begin to run until the underlying case was finally resolved. *See Arnold v. Nat. County Mutual Fire Ins. Co.*, 725 S.W.2d 165, 167 (Tex. 1987) and *Aranda v. Ins. Co. of North America*, 748 S.W.2d 210, 213 (Tex. 1988). Mrs. Richards' underlying lawsuit was finally resolved in June, 1986 when the Texas Supreme Court refused Liberty Mutual's application for writ of error. Operating under the unmistakable impression that she had filed suit within the permissible time, Mrs. Richards and her lawyer proceeded to trial in this case in June, 1988. As a matter of fundamental fairness, any change in the statute of limitations should be applied prospectively.

In *Chevron Oil Company v. Huson*, 92 S. Ct. 349 (1971), the Untied States Supreme Court addressed the question of whether a new statute of limitations should be applied non-retroactively. In doing so, the Court observed:

> In our cases dealing with the nonretroactivity question, we have generally considered three separate factors. First, the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied, (citation omitted), or by deciding an issue of first impression whose resolution was not clearly foreshadowed (citation omitted). Second, it has been

> stressed that "we must * * * weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation" (citation omitted). Finally, we have weighed the inequity imposed by retroactive application, for "[w]here a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the 'injustice or hardship' by a holding of nonretroactivity" (citation omitted).
>
> Upon consideration of each of these factors, we conclude that the Louisiana one-year statute of limitations should not be applied retroactively in the present case. *Rodrigue* was not only a case of first impression in this Court under the Lands Act, but it also effectively overruled a long line of decisions by the Court of Appeals for the Fifth Circuit holding that admiralty law, including the doctrine of laches, applies through the Lands Act.
>
> * * *
>
> When the respondent was injured, for the next two years until he instituted his lawsuit, and for the ensuing year of pretrial proceedings, these Court of Appeals decisions represented the law governing his case. It cannot be assumed that he did or could foresee that this consistent interpretation of the Lands Act would be overturned. The most he could do was to rely on the law as it then was.
>
> * * *
>
> Yet retroactive application of the Louisiana statute of limitations to this case would deprive the respondent of any remedy whatsoever on the basis of superseding legal doctrine that was quite unforeseeable. To abruptly terminate this lawsuit that has proceeded through lengthy and, no doubt, costly discovery stages for a year would surely be inimical to the beneficent purposes of the Congress.

Id. at 355-56.

As a general rule, a decision of the Texas Supreme Court is to be applied retrospectively. "However, exceptions are recognized when

considerations of fairness and policy preclude full retroactivity. Resolution of the issue turns primarily on the extent of public reliance on the former rule and the ability to foresee a coming change in the law." *Sanchez v. Schindler*, 651 S.W.2d 249, 254 (Tex. 1983). Mrs. Richards and many other injured workers have relied on the Texas Supreme Court's standard in *Arnold* and *Aranda*. It was virtually impossible for Mrs. Richards to foresee that the Texas Supreme Court would change the *Arnold-Aranda* statute of limitations formula.

Appellee respectfully urges this court to follow the reasoning of the Court in *Huson* and apply any new statute of limitations in a prospective manner. For these reasons, Appellant's appointive [sic] error 57 should be overruled.

PRAYER FOR RELIEF

For these reasons, Dolores J. Richards respectfully requests that this court affirm the judgment of the trial court, and prays for any further relief to which she may show herself to be entitled.

Respectfully submitted,

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ATTORNEYS FOR APPELLEE,
DOLORES J. RICHARDS

[Excerpts from Richards' Application for Writ of Error in Texas Supreme Court: Complete Table of Contents]

NO. _____

IN THE
SUPREME COURT OF TEXAS

DOLORES J. RICHARDS,
Petitioner,
v.
LIBERTY MUTUAL FIRE INSURANCE COMPANY,
Respondent.

On Application for Writ of Error
from the
Court of Appeals
for the
Fourteenth Supreme Judicial District

APPLICATION FOR WRIT OF ERROR

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ORAL ARGUMENT REQUESTED

* * * *

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* * * *

PRAYER FOR RELIEF

For these reasons, Dolores J. Richards respectfully requests that this Court reverse the judgment of the court of appeals and remand this cause to the Fourteenth Court of Appeals for further consideration of Liberty Mutual's other points of error. Petitioner also prays for any further relief to which she may show herself to be entitled.

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